IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his Capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiffs,	)	
v.	)	Case No. 05-CV-329-GKF-SAJ
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

RESPONSE OF DEFENDANT SIMMONS FOODS, INC.
TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

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I. INTRODUCTION AND BACKGROUND

Defendant, Simmons Foods, Inc. ("Simmons"), hereby responds to Plaintiffs' motion for protective order which seeks to prevent the deposition of Plaintiff Drew Edmondson. Plaintiffs raise two reasons to prevent General Edmondson's deposition: (1) he is not a plaintiff; and (2) he is too important an official to give testimony. Simmons will demonstrate below that: (1) General Edmondson is acting as the client in this matter rather than as trial counsel; and (2) the judicially created "high government official" rule which gives limited protection from deposition to federal bureaucrats does not apply here to a state official who has been often deposed in recent years.

Simmons submitted its notice of deposition on December 13, 2006, giving two months to tee up and resolve the issue before the deposition date. Plaintiffs waited until January 23 to raise their objection and move for a protective order. Simmons is grateful the Court has agreed to hear the matter on February 15, so the objection can be resolved and discovery can proceed.

II. GENERAL EDMONDSON IS NOT A NECESSARY PLAINTIFF, BUT HE IS ACTING AS A PLAINTIFF IN THIS CASE

Plaintiffs first argue General Edmondson is merely one more trial counsel representing the State and his deposition is barred by the general reluctance of courts to allow depositions of trial counsel. They delve into General Edmondson's statutory authority to bring or defend lawsuits on behalf of the State and note that he has entered an appearance in the case (motion papers at p. 4). From this Plaintiffs jump to the limitations sometimes imposed on taking the deposition of trial counsel.

So Simmons should explain at the outset its reasons for wanting to depose General Edmondson and his role in the case. A party is entitled under the Federal Rules

of Civil Procedure to take the deposition of any person who has discoverable information. And a party does not usually have to justify the decision to question a witness or telegraph its questions. But Simmons understands that given the status of General Edmondson as a lawyer and the objections raised by Plaintiffs, the Court may have some concerns; we are happy to address those possible concerns. Simmons does not intend to depose General Edmondson in his capacity as counsel and is not trying to delve into any secret attorney/client discussions. Simmons wants to ask General Edmondson what he knows about various topics involved in the lawsuit.

Simmons believes that General Edmondson was not a necessary plaintiff. The case was brought by him and by the Oklahoma Secretary of the Environment C. Miles Tolbert, in Secretary Tolbert's capacity as Trustee for Natural Resources for the State of Oklahoma. Secretary Tolbert should have sufficed as a plaintiff and Secretary Tolbert verified the Plaintiffs' responses to Simmons' interrogatories. General Edmondson's desire to have his name on a large piece of litigation which would likely get substantial press coverage is of course understandable—he is an elected official. At the same time, General Edmondson cannot immunize himself from discovery by entering his appearance as an attorney in the case. The State of Oklahoma is a named Plaintiff. But an entity like a state is impossible to question except in the form of an actual person, just as the State of Oklahoma has to have an actual person verify its interrogatory answers.

Simmons' situation is akin to the discovery requests to which Plaintiffs would not give a straight answer. Now, a year and a half into the case, Simmons wants to ask questions of a representative of Plaintiffs. General Edmondson has made numerous public statements, acting as a spokesperson for Plaintiffs. In our papers asking Plaintiffs

to actually answer our interrogatories about what Plaintiffs contend are the facts, Simmons attached a January 23, 2005 Tulsa World article interviewing the Attorney General. There, Plaintiffs' representative was happy to discuss allegations and cite figures.

> The AG's staff contends the amount of poultry-generated phosphorus flowing into the Illinois River/Lake Tenkiller watershed alone is equal to the phosphorus that would be generated 'by an additional 10.7 million people living in the watershed without waste-water treatment'...Edmondson's office calculated that 58 percent of the phosphorus flowing into Lake Tenkiller comes from runoff, and 95 percent of that phosphorus comes from poultry litter.

Just as Plaintiffs wanted to depose Randy Allen who appeared in public education television spots, Simmons intends to depose General Edmondson about, among other things, his various public pronouncements. For convenience, a few of the more recent statements by General Edmondson to the press and public are reprinted below. The actual articles and the like are collected as Exhibit A hereto.

6/14/2005	Tulsa World	"The attorney general said he has never claimed that the poultry industry was the only source of pollution, just the major one."
11/3/2005	NewsOK.com	Edmondson: "You can't stand on the Arkansas side of the border, dump toxins into the river and wash your hands of the problem. The state of Arkansas cannot license pollution in a neighboring state."
11/4/2005	Oklahoma Journal Record	"This industry has proven by its inaction, by its combating lawsuits once filed, that it will not take any action to stop the pollution of the waters in Arkansas and Oklahoma until they are forced to do so by action of federal court," said Edmondson.
2/5/2006	Arkansas Democrat Gazette	(discussing settlement negotiations) "At no time did we make a demand in settlement seeking as much as the total cost of reclamation. We're aware they couldn't afford it. It would work a hardship on some of the smaller companies."

2/21/2006	Oklahoma AG Press Release	"'Animal waste in and of itself is not hazardous waste,' Edmondson said. 'But when the waste contains elements like arsenic, copper and zinc, it can be hazardous, and the state should be afforded the opportunity to prove that in a court of law…We have always said poultry is by far the single largest polluter in the watershed - not cattle, not golf courses, not mom and pop with a septic tank"
5/10/2006	InsideEPA.com	"Edmondson says he is not so much concerned about the manure itself, but feed additives and other toxic materials, such as zinc, arsenic, copper and growth hormones, that end up in manure as a result of the animal feeding process at CAFOs."
5/31/2006	Guymon Daily Herald	In referencing poultry litter, Edmondson stated, "It's an excellent fertilizer. To the extent it is needed as fertilizer it should be applied. But if you put down all that the plant needs and continue to put it down, then you're not fertilizing, you're dumping and it's going to end up in the water. That's what we've alleged…'This lawsuit is specific to the Illinois River Watershed,' Edmondson said. 'So this lawsuit wouldn't effect Western Oklahoma at all.'"
6/15/2006	The Daily Times	"The attorney general actually agrees with Peek to a point, saying animal waste, in itself, is not a hazard. He says the problem comes when millions of chickens in concentrated animal feeding operations produce too much waste for the land to handle . . . He said the fertilizer is excellent, 'but plants only need so much nitrogen and phosphorus . . . Edmondson said cost is a big reason why he thinks poultry companies in his lawsuit should pay for moving the hundreds of thousands of tons of stored waste, and not the farmers who raise chickens for them but typically own the litter. 'The wheat farmers in western Oklahoma would love to get this, but there is a dollar cost to the transportation,' the attorney general said. 'Farmers cannot afford to truck it out to Ellis County, Oklahoma, and sell it to wheat farmers. The corporations created the problem; the corporations need to deal with it….But Edmondson doesn't believe beef, pork, and smaller poultry producers pose many problems because most of them adhere to state regulations. He shook his head while saying the legal action is not about them." After stating that cattle and hog operations do not violate the law, Edmondson claims "The permits, the law and the regulations all

		state that in no event shall their application result in runoff to the waters, and that is what's being violated. It's every day, but it's not intentional. The farmers aren't taking this stuff down and dumping it in the creek; they are surface-applying it to the land and it's running off because the land can only take so much."
6/15/2006	EnidNews.com	"Edmondson said members of the poultry industry would like cattle producers to think that the lawsuit applies to them, too, but it does not. 'The cattle industry should not be involved in this fight because cattle are not part of the litigation,' Edmondson said. . . . Edmondson said he has met with the members of the Oklahoma Cattlemen's Association and other agriculture groups to present his situation."
6/20/2006	Tulsa World	"Edmondson says he has a 'great deal of sympathy' for the poultry farmers. The companies have said for decades that the burden of dealing with the poultry litter rests with the poultry grower, Edmondson said. 'And they've done the best they could under the rules,' Edmondson said. 'But the farmers can't afford to fix the problem. The farmers cannot afford to truck the excess (litter) out of the basin. We're trying to place that burden on the companies where it belongs.'"
7/13/2006	The Morning News	Edmondson claimed that he would be happy to negotiate a settlement, but stated that the defendants refused to negotiate in good faith.
7/29/2006	Tulsa World	"There is no doubt in my mind that we can make the case in court that poultry litter is the predominate [sic] cause of pollution in the rivers and the lake . . . . That's why they've tried to stop this in the Oklahoma Legislature," he said. "That's why they've tried to stop it in Congress, and that's why they are running these ads... The attorney general said the advertisements are familiar to him. 'It reminds me a great deal of what the tobacco industry did back in the '50's,' he said, 'when they ran big ads saying they were going to talk straight to the American people and went

		on to say there was no link between smoking and cancer.'"
8/29/2006	Stories That Matter	"One thing no one disputes is the cost of fixing the problem will be high. Attorney General Edmondson acknowledges that the 14 food processors he is suing will face a significant competitive disadvantage if he wins. Edmondson says he regrets that a victory for his side will raise the cost of Arkansas poultry by 10 cents a bird in a market where fractions of a penny mean precious market share. 'This is a national problem, and there really should be a national solution applied equally to everyone,' Edmondson complains."
9/10/2006	Arkansas Democrat Gazette	"It's been that way since 2002, when Oklahoma Attorney General Drew Edmondson first ordered the Oklahoma Scenic Rivers Commission administrator to 'stand down' and stop communicating with Northwest Arkansas representatives . . . Edmondson, who for years has battled Arkansas cities, businesses and state agencies over water quality issues, believes Fite's dealings with Arkansas officials potentially undercut Oklahoma's position in federal court . . . So every time Fite presents a Northwest Arkansas city with a certificate of honor from the Scenic Rivers Commission for upgrading a sewer plant, Edmondson and his staff fume. Equally frowned upon is his regular communication with Arkansas poultry industry representatives he's gotten to know during 23 years directing the commission. 'You don't want someone purporting to speak for the state undercutting your position,' Edmondson said in a Sept. 1 interview. 'Ed Fite was in conversations that I wasn't privy to. I don't know what was being said, and I simply could not have that. When you are in litigation, the attorney general is in charge no matter what other agencies are involved, including the governor.'
9/10/04	Tulsa World	*Poultry firms offer litter plan*: 'It is our opinion, and it would be our evidence, that the largest contributing factor to the damage of those streams has been pollution from poultry," he said. "it is also the single most manageable source of that pollution."

1/13/05	Tulsa World	From *Poultry firms on offensive again*: "Edmondson wrote to the poultry industry's attorney, canceling talks that had been scheduled for Thursday and Friday, saying he expected the companies to 'cease and desist your efforts to undermine this office and its effort to enforce the laws of the State of Oklahoma.'"
9/23/2006	The Oklahoman	In opposing federal legislation exempting animal manure from CERCLA, "He said federal law already includes exemptions for normal agricultural use of manure as fertilizer. Edmondson contends in his federal lawsuit that massive applications of chicken waste containing chemicals added to the feed is polluting water in eastern Oklahoma. . . He said he could understand the concerns of cattlemen, but that their fears were being generated by misinformation from poultry interests. 'Nobody's looking at anybody but major poultry operations,' Edmondson said."

General Edmondson has chosen to make a variety of statements to the public. He cannot duck giving testimony on these subjects by also appearing on the pleadings.

As a practical matter, General Edmondson is not acting as counsel in the case. General Edmondson has not been signing pleadings. He has rarely argued to the Court. That is, he has not been acting as counsel in this case, although he may be the State's chief lawyer. His status as chief lawyer doesn't prevent him from acting in other capacities. Entry of appearance or not, in this matter General Edmondson is the client, the party representative to the outside lawyers. Here are just a few examples of General Edmondson's role as client in this litigation:

1. When the parties mediated in the summer of 2005, General Edmondson was the decision-maker for the State of Oklahoma. The negotiations clearly demonstrated that the decision to settle this case, and on what terms, lies solely with General Edmondson, which is the quintessential role of a client;

2. Neither the Governor, Legislature, nor any agency head has exerted any decision-making authority in this case;

3. No agency requested that General Edmondson commence this lawsuit, the decision was his alone;

4. General Edmondson spoke at several events where he made references to his personal observations about changes in the Illinois River; and

5. In his television campaign spot, General Edmondson claimed to be standing in the Illinois River holding a jar of milky water and made many factual allegations about the Defendants. Simmons wants to know when and where that ad was shot, whether someone was upstream raking sediment up from the bottom for effect, and what basis General Edmondson has, if any, for his factual allegations. The ad can be viewed from the following link:

http://www.edmondsonagain.com/media-room.asp

If someone other than General Edmondson was the State's decision-maker in this litigation, then Defendants would be entitled to a statement on the record designating that person as Plaintiffs' decision-maker. However, as demonstrated above, General Edmondson is the client and decision-maker in this litigation, and as such he is subject to being deposed.

Also relevant is the following passage from the hearing before this Court on December 15, 2006:

> MR. BAKER: I'm going to go directly to explaining why the State believes that the discovery sought of Mr. Allen is relevant.
>
> I think it's best summed up in the advertising featuring Mr. Allen that is run in Oklahoma that we attached to our brief, and I think reading that advertisement, it's very brief, really informs the discussion. Here's what it says:
>
> > "Jean and Randy Allen, Oklahoma farmers. There are two things farmers are, hard working and honest, in no particular order. That's why it's so surprising the attorney general is claiming poultry farmers are breaking the law when it comes to applying poultry litter as fertilizer to their

> land. Truth is, they're only applying what the law allows. If there's any left, they sell it to other farmers who use it to help their crops grow. It's just one of many things the industry is doing to help the environment, the farmers, the companies working together."

As Mr. McDaniel just mentioned, this is an educational campaign. Educational campaign [sic] are designed, as I understand the word educational, to impart information, facts. From the advertising it's plain that Mr. Allen is holding himself out as an individual with factual knowledge of the Oklahoma poultry industry's purported compliance with the law with regard to the land application of poultry waste. He doesn't limit it to the Eucha Watershed, he's speaking generally and that includes the Illinois River Watershed.

Likewise, he's holding himself out as an individual with factual information concerning the poultry industry's purported conduct with respect to the handling of excess poultry waste. He's not limiting it to the Eucha Watershed, he's speaking generally and that includes the Illinois River Watershed. Likewise, he's speaking out or holding himself out as having factual information on the purported efforts to help, quote, "help our environment." That includes the environment located within the Illinois Watershed.

These issues are plainly relevant to the claims asserted in State's [sic] first amended complaint. Namely, the improper waste for which the poultry integrators are responsible for has caused environmental injury to the Illinois River Watershed, that portion located within Oklahoma. The State would be remiss if it did not seek to depose Mr. Allen on these issues when he's held himself out as having factual information.

. . .

MR. BAKER: It's also been suggested that -- that this deposition is some way to -- the only reason we're taking this deposition is to somehow get back to him for speaking out. The fact of the matter is, we aren't asking his opinions. And they have tried to reframe this as this is Mr. Allen simply speaking his opinions. If you look at the content of the ad, he is making purported factual statements. We are entitled to test those factual statements as they pertain to the Illinois River Watershed.

. . .

> THE COURT: I'm going to require Mr. Allen to stand for deposition . . . I think if you want to analogize it to a car wreck, a simple car wreck case with maybe running a red light, he very publicly, I think, has said that I was there, I saw the accident and I can testify that either they did or they did not run the red light. So, any witness that very publicly says he has factual information about issues relevant to the lawsuit could be subpoenaed by either side. He specifically says he has knowledge about the attorney general's lawsuit which is reference to the - - and has knowledge about the facts relating to the attorney general's lawsuit, so I think he's subject to examination on what he knows about those issues.

Transcript at 12:20 - 14:12; 14:21 - 15:4; 19:11-24. Thus, General Edmondson is also subject to deposition because he has very publicly stated, on numerous occasions, that he possesses factual information relevant to this lawsuit.

Plaintiffs rely on *Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995) for the idea that the Tenth Circuit has adopted a definitive rule basically barring depositions of attorneys by reversing the usual standard for a protective order under Rule 26(c). According to Plaintiffs, the Tenth Circuit has held that the party seeking discovery from a lawyer bears the burden of proof to establish that: "(1) the only means of obtaining information is through deposition of opposing counsel; (2) the information sought is relevant and non-privileged; and (3) [the] information sought is crucial to the preparation of the case." Plaintiffs' motion at pp. 4-6.[1]

Given that reliance, it is helpful to examine what actually happened in *Boughton* and what the court actually said. *Boughton* involved an appeal from a Colorado district court's refusal to certify a class and various related discovery orders. Among other complaints by the plaintiffs, the district court had denied the plaintiffs' request to depose the defendant's outside counsel and granted a protective order.

[1] The factors come from an Eighth Circuit case from the 1980s, *Shelton v. American Motors Corp.*, 805 F.2d 1327 (8th Cir. 1986). The *Shelton* case announced its factors in reversing a sanction of dismissal against American Motors for its lawyer's refusal in deposition to admit to the existence of documents.

*Boughto*n did not adopt any sweeping reversals of the usual burden in seeking a protective order. The opinion was limited to determining whether a district judge had abused his discretion in granting a protective order. The Court of Appeals held that under the abuse of discretion standard for reviewing protective orders under Rule 26, the district court's exercise of discretion was not reversible. The testimony in the record established that the outside lawyer had no decision making role with the defendant and was just a talking head. The district court had concluded it made more sense to ask the officers and directors of the defendant about the company's decisions and actions before attempting to ask their outside lawyer about the same subjects.[2] In that context, and the normal contexts of companies with outside counsel, the ruling makes sense. In our situation, of course, there is no board of directors or officers to depose—the "chief lawyer" is also the client who caused the lawsuit to be filed.

The Tenth Circuit explained the limited nature of its ruling:

> ...the question is whether the trial court abused its discretion in attempting to protect the defendants from an unnecessary burden. Viewed in this light we approve of the criteria set forth in *Shelton v. American Motors, supra*, but at this time we need only make the more limited holding that ordinarily the trial court at least has the discretion under Rule 26(c) to issue a protective order against the deposition of opposing counsel when any one or more of the three *Shelton* criteria for deposition listed above are not met.

65 F.3d at 830.

Plaintiffs also rely on *In re Muskogee Environmental Conservation Co.*, 221 B.R. 526 (E.D. Okla. 1998) and *Simmons Foods, Inc. v. Willis*, 191 FRD 625 (D. Kansas 2000). The *Muskogee Environmental* case involved a subpoena duces tecum to the

[2] The Court of Appeals agreed that "only after such questioning would the district court have been fully able to assess whether McGrath's [the lawyer's] deposition was crucial to their case. Accordingly, we affirm the decision to grant the protective order." 65 F.3d at 831.

debtors' counsel by some creditors. The creditors requested all the lawyer's files about his representation of the debtor to a certain date, arguing that by filing bankruptcy the debtor had surrendered its privilege. Judge Michael took the *Boughton* discussion as having conclusively adopted the Eighth Circuit *Shelton* factors in this circuit[3] and concluded that deposing the debtor's outside counsel and subpoenaing all his files from the representation was inappropriate. 221 B.R. at 533. While the end result in the *Muskogee Environmental* case seems sensible, it is clear from actually reviewing *Boughton* that the Eastern District treated *Boughton* as more definitive than it actually was.

The *Simmons Foods* case from Kansas came to what seems a sensible result, but acknowledged that the Tenth Circuit has not adopted the *Shelton* factors as some definitive rule for this circuit. In the Kansas case the defendant law firm subpoenaed Simmons' outside litigation counsel to bring his entire Simmons file and appear for deposition.[4] From the situation as laid out in the opinion, the intention appears to have been abusive.

The district court recognized that under the Federal Rules of Civil Procedure, any person can be deposed and the rules contain no prohibition on attorney depositions. The district court also recognized that in the Tenth Circuit, there is no definitive test laid down, like the *Shelton* factors, for evaluating the attorney deposition issue.[5] Similarly to

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[3] 221 B.R. at 529.
[4] 191 FRD at 629.
[5] 191 FRD at 630. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 FRD 245 (D. Kan. 1995) also recognized that the *Shelton* factors are not some iron rule in this circuit.

Boughton, the district court in Kansas suggested the depositions of corporate agents before trying to question opposing counsel.[6]

Presumably Simmons is supposed to be chagrined because in that case it successfully prevented its outside litigation counsel in the case from being deposed and producing his entire file about his representation of Simmons, while here Simmons is asking to depose someone who is a lawyer. Simmons is not. As in so many other areas of the law, general principles sound useful, but the actual facts on the ground lead to different appropriate results.

The *Shelton* approach to attorney depositions has not exactly been universally approved and followed. The federal courts have taken a variety of different approaches to the issue. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65 (2nd Cir. 2003), for example, set forth a flexible approach recognizing that the Federal Rules of Civil Procedure have a permissive deposition-discovery regime, and parties are not usually required to justify their deposition requests. They preferred to take an approach based on inappropriate burden or hardship, consistent with the factors set forth in Rule 26. *See* 350 F.3d at 67-72.[7]

Given that the *Shelton* factors have been looked to for guidance, Simmons will briefly address how this request fits those factors. The first factor is the only means of obtaining information is through deposition of opposing counsel. This is where many of the attorney deposition cases turn. As mentioned in the cases already discussed,

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[6] 191 FRD at 631 and 637.

[7] The Second Circuit noted that only the Sixth Circuit had expressly adopted the *Shelton* standard, although the Tenth Circuit had declined to reverse a district court's exercise of discretion based on those factors. *See also Kaiser v. Mutual Life Insurance Company of New York*, 161 FRD 378 (S.D. Ind. 1994), which found lawyer depositions were not such a constant scourge that the usual rules for protective orders need be reversed; and *Rainbow Investors Group, Inc. v. Fuji Trucolor Missouri, Inc.*, 168 FRD 34 (W.D. La. 1996), which observed no reason for reversing the normal burden of proof on protective orders and that lawyer depositions may be necessary and appropriate when the lawyer has factual knowledge.

generally courts prefer that discovery be directed first to a company's decision-makers before delving into what the outside or in-house counsel said or thought. That preference is understandable in the usual context where the lawyer is the servant of the decision makers. But our situation in this case is different. Here the lawyer is the decision maker as well as spokesperson. Indeed, General Edmondson has proclaimed that only the Attorney General can speak for the State in poultry matters.[8] General Edmondson made this statement while giving his deposition in *Marie Kathleen West v. Kelly Hunter Burch, Tom Gruber, Drew Edmondson, in his official capacity, and The State of Oklahoma ex rel. The Office of The Attorney General,* United States District Court for the Western District of Oklahoma Case No. CIV-03-1019-L. *See* Exhibit B, deposition of W.A. Drew Edmondson at 104:6 - 105:5.

In addition, Ms. West's testimony raised issues that only General Edmondson can speak to, e.g., whether he was on a lark of his own in deciding to file and whether the decision was related to his re-election campaign or on ascertainable substance. Ms. West was the lawyer for the Oklahoma Scenic Rivers Commission and the Oklahoma Conservation Commission, pursuant to contracts between the Office of the Attorney General and the two agencies whereby the agencies paid the Office of the Attorney General for Ms. West's services. According to Ms. West, General Edmonson only got involved in the poultry issue after he decided to run for re-election and then he torpedoed the negotiations that were going on at that time between the poultry companies and the agencies because he wanted to enhance his own political clout. *See* Exhibit C, deposition of Marie West at 157-162. Ms. West testified

[8] Simmons disagrees with General Edmondson's conclusion that he is the only person who can speak on behalf of, and bind, the State of Oklahoma on poultry, watershed and other issues involved herein.

> [T]he two agencies were told, despite their efforts to resolve the issue, to stay out of it. And Drew took this on, and it was during the time he was running for re-election, was in the media on numerous occasions, later to drop the ball . . . . He had told the agencies to stay out of it, that it was his job and he wanted to run it, regardless of what input they might have or experience or expertise in that area.

See Exhibit C, deposition of Marie West at 157-158.

Simmons and the other Defendants negotiated in good faith with the agencies and with General Edmondson before he filed this lawsuit. However, Plaintiffs allege that Defendants negotiated in bad faith and for years refused to work with Plaintiffs concerning the watershed. Plaintiffs further allege that Defendants' conduct establishes a conscious disregard for the rights of others supportive of punitive damages. In turn, Defendants assert that General Edmondson negotiated in bad faith, refused to work with Defendants concerning the watershed, and never had any intention of resolving this case short of litigation, all of which are borne out by Ms. West's testimony. As stated above, General Edmondson has proclaimed that the Attorney General is the only person who can speak and act for the State on poultry issues. Accordingly, only General Edmondson can speak concerning his motivation and reasoning for refusing to work with Defendants. Thus, the only means of obtaining this information, which resides in General Edmondson's mind alone, is through the deposition of General Edmondson himself.

The second factor is the information sought is relevant and non-privileged. The non-privileged aspect depends on what questions are asked. Simmons has no desire to waste its time and resources asking General Edmondson questions which seek to invade

legitimate privileges.[9] Simmons' counsel is a big believer in the privilege. General Edmondson, however, should possess substantial information which is highly relevant and not privileged. While parties are not generally required to preview their questions of a witness, obviously Simmons will want to inquire for example about the basis for several of General Edmondson's factual statements to the public.

The third factor is the information sought is crucial to the preparation of the case. Plaintiffs have sued Simmons and others for millions of dollars, and for substantial changes in the way they do business with their independent contractor growers, and presumably in the way those contract growers do business, but without (so far) disclosing to defendants any detailed factual basis for the lawsuit.

Unlike the normal business or personal situation involved in most litigation, we face here an action supposedly on behalf of the population of a whole state. Who does one depose to learn more? General Edmondson has taken the role of chief public apologist for the lawsuit, freely making factual allegations to the public. So he is an excellent candidate with which to start.

III. GENERAL EDMONDSON IS NOT A "HIGH GOVERNMENT OFFICIAL" FOR PURPOSES OF THE JUDICIALLY CREATED RULE GIVING LIMITED PROTECTION TO FEDERAL OFFICIALS

Plaintiffs also resist General Edmondson's deposition on the theory he is a high government official protected from deposition. Plaintiffs rely on cases like *United States v. Northside Realty Associates, Inc.*, 324 F. Supp. 287 (N.D. Ga. 1971) and *Church of Scientology of Boston v. IRS*, 138 FRD 9 (D. Mass. 1990). The federal courts have

[9] Given the discovery positions taken by Plaintiffs so far in the case, Simmons cannot guarantee the absence of any disputes over privilege issues. But inquiring into legitimately privileged matters is not Simmons' intent.

protected high ranking federal officials from depositions in most instances. District courts around the country have tinkered with how far down the ladder the protections go and how they interact with regulations adopted by various federal agencies prohibiting their employees from being deposed or imposing internal pre-deposition procedures. Those issues are not implicated here. The "high government official" rule is a court-created rule, designed to protect the heads of federal agencies from being deposed about policy questions of which they are unlikely to have any personal knowledge anyway. In its specific context, the federal "high government official" rule makes some sense.

Federal agencies get sued very commonly over policies or decisions. In most cases the decision maker at whatever level is involved can be deposed and the lawsuit resolved without necessarily personally involving the head of the federal agency. And in most instances the head of the federal agency probably has no personal knowledge of the policy or decision involved in the case. Those attempts normally smack of harassment.

But the Oklahoma courts have never adopted a similar rule to protect state officials from depositions. This may be because state agencies tend to be smaller. Or it may be because the state intends its employees to be more responsive to the needs of litigants or constituents than the heads of large federal agencies based in Washington, D.C. In any event, neither Oklahoma's legislature nor courts have ever made that policy decision and this Court should not invent one for them.[10]

General Edmondson has been deposed before without complaint, based on a cursory review. So the "high government official" exemption from testimony for General Edmondson appears to be a new idea. One of Simmons' counsel deposed

[10] Different states appear to take different approaches to the question which are recognized by the federal courts. *Green v. Baca*, 226 FRD 624 (C.D. Cal. 2005), for example, allowed the deposition of a sheriff who had personal knowledge of a policy and was the final decision maker. 226 FRD at 648-49.

General Edmondson (and his chief Assistant Attorney General with respect to a particular subject) in March of 2005 in a lawsuit in the Northern District of Oklahoma, *Xcaliber International Limited, LLC and KT&G Corp. v. W.A. Drew Edmondson, in his official capacity as Attorney General, State of Oklahoma*, Case No. 04-CV-922EA(C).[11]

IV. CONCLUSION

General Edmondson is a lawyer. In this case, however, he is acting as the client. He might not be a necessary party, but he chose to be one. A client who happens to be a lawyer cannot immunize himself from deposition by entering an appearance in his own lawsuit.

The courts of the Tenth Circuit have not adopted any rule reversing the burden of proof for protective orders where a lawyer is involved as a witness. An attempt to abusively depose opposing counsel for no good purpose, or to inquire pointlessly after privileged matters, could be subject to a protective order. This is not that situation. Even if the court were to apply the criteria used in the Eighth Circuit, Simmons has adequate and legitimate reasons to depose General Edmondson.

Oklahoma has not attempted to follow the federal courts in crafting a judicial rule largely immunizing its employees from giving testimony. This court should not invent such a new rule on its own. General Edmondson has been deposed before without incident and Simmons will use its time with General Edmondson responsibly. Plaintiffs' motion for protective order should be denied.

[11] A copy of the cover page and appearances from General Edmondson's deposition in the *Xcaliber* case is Exhibit D hereto.

Respectfully submitted

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I hereby certify that on February 7, 2007, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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